

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 4:15-CR-00049-DDN
)	
)	
RAMIZ ZIJAD HODZIC, ET AL.,)	
)	
Defendants.)	

STATUS HEARING

**BEFORE THE HONORABLE DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE**

FEBRUARY 6, 2018

APPEARANCES:

For Plaintiff: Matthew Drake, Esq.
Joshua D. Champagne, Esq.
Kenneth R. Tihen, Esq.
OFFICE OF THE U.S. ATTORNEY
111 South 10th Street, 20th Floor
St. Louis, MO 63102

For Defendant Diane L. Dragan, Esq.
Ramiz Zijad Hodzic: Kevin Curran, Esq.
OFFICE OF FEDERAL PUBLIC DEFENDER
1010 Market Street, Suite 200
St. Louis, MO 63101

Recorded By: K. Stamm

Transcribed By: REAGAN A. FIORINO, RMR, CRR, CSR, CCR
Official Court Reporter
United States District Court
111 South 10th Street
St. Louis, MO 63102 | (314)244-7989

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1 APPEARANCES CONTINUED:

2 For Defendant Kim C. Freter, Esq.
3 Sedina Unkic Hodzic: LAW OFFICE OF KIM C. FRETER
4 225 South Meramec, Suite 1100
5 St. Louis, MO 63105

6 For Defendant JoAnn Trog, Esq.
7 Nihad Rosic: MENEES AND WHITNEY
8 121 W. Adams
9 Kirkwood, MO 63122

10 For Defendant Charles D. Swift, Esq.
11 Armin Harcevic: CONSTITUTIONAL LAW CENTER FOR MUSLIMS
12 IN AMERICA, INC.
13 833 E. Arapaho Road, Suite 102
14 Richardson, TX 75081

15 For Defendant J. Christian Goeke, Esq.
16 Jasminka Ramic: LAW OFFICES OF J. CHRISTIAN GOEKE, P.C.
17 7711 Bonhomme Ave., Suite 850
18 St. Louis, MO 63105

19 Also Present: Paul J. D'Agrosa, Esq.

20 * * *

FEBRUARY 6, 2018

(The proceedings commenced at 10:16 a.m.)

THE COURT: Good morning, everybody.

All right. In the case of the United States versus Ramiz Hodzic, Sedina Hodzic, Nidah Rosic, Mediha Salkicevic and Armin Harcevic, Case No. 4:15-CR-49, the matter is before this Court this morning for a status conference and I expect and hope a scheduling conference.

Let's see. On behalf of the Government, Mr. Tihen is here and Mr. Drake is here and Mr. Champagne is here.

All right. And on behalf of Ramiz Hodzic, let's see, Ms. Dragan, she's here. And on behalf of Sedina Unkic Hodzic, Mr. D'Agrosa is here momentarily.

MR. D'AGROSA: I'm here, Your Honor. Thank you.

THE COURT: And, let's see, for Nihad Rosic, JoAnn Trog. And Mediha Medy Salkicevic -- well, Mr. Goeke is here.

MR. GOEKE: Yes, Your Honor.

THE COURT: Do we have Ms. Gambino by phone?

THE CLERK: We tried but she did not answer.

THE COURT: All right.

THE CLERK: A message was left.

THE COURT: Okay. Thank you.

And for Armin Harcevic, Mr. Swift.

MR. SWIFT: Yes, Your Honor.

THE COURT: Pleased to have you in St. Louis.

1 **MR. SWIFT:** It is good to be back, Your Honor. A
2 little cold today.

3 **THE COURT:** It is.

4 All right. And even though this was noted to be a
5 counsel-only conference, you know, the defendants -- I don't
6 know. Are any of the defendants personally available?

7 Oh, and that is Sedina Hodzic is here.

8 **MR. D'AGROSA:** Yes, she is here, Your Honor, for the
9 record.

10 **THE COURT:** All right. Thank you very much.

11 All right. The first thing I do want to take up is
12 Mr. D'Agrosa's motion for leave to withdraw and for the
13 appointment of replacement counsel. And just right off the
14 bat, I do understand Ms. Freter is here. Where is she?

15 **MS. FRETER:** Yes, Judge.

16 **THE COURT:** All right. Do you want to come up,
17 please.

18 I have given a lot of thought to this and, of
19 course, there is really no alternative to granting the motion
20 to allow Mr. D'Agrosa to withdraw. And I will appoint
21 attorney Kim C. Freter to represent Sedina Unkic Hodzic in
22 Mr. D'Agrosa's absence. So, you know, so you are now
23 appointed and there will be a documentary order to follow.

24 Mr. D'Agrosa, you are granted leave to withdraw.

25 The order that will be filed will have some language

1 in it just to be sure that the -- everyone knows what the
2 Court's position is with respect to the rules of professional
3 responsibility. No belief that there would be any problem in
4 that respect, but I think it's fair to make it stated, you
5 know, not only for everyone's benefit but for the Court's
6 benefit as well.

7 Going with the U.S. Attorney's Office, there will be
8 some constraints about your involvement, of course, with the
9 interchange, exchange of information within that office, and
10 I'm confident that there will be no problem in that respect.

11 And as I had previously appointed second counsel
12 also to represent this defendant, I would do the same. And
13 when we are finished this morning, Ms. Freter, if you would
14 just wait a bit and I'll counsel with you about that.

15 **MS. FRETER:** Thank you, Your Honor.

16 **THE COURT:** All right.

17 **MR. D'AGROSA:** Judge, I just want to state for the
18 record that I'm, of course, aware of the ethical obligations.

19 **THE COURT:** Sure.

20 **MR. D'AGROSA:** So prior to today I had informed all
21 counsel in the matter, including Government counsel, of the
22 move I was making. And of course I informed my client and we
23 spoke. And I was anticipating a new counsel being appointed
24 and Ms. Freter as well; so I discussed the matter with her. I
25 was a little presumptuous that perhaps you would appoint her,

1 so we had talked, and I hope there will be -- I'm sure there
2 will be a smooth transition.

3 **THE COURT:** All right.

4 **MR. D'AGROSA:** Thank you.

5 **THE COURT:** Good. Thank you very much.

6 All right. The next matter really is the scheduling
7 of the hearing that counsel for the defendants have asked for
8 and actually the joint motion for hearing to determine the
9 viability of an affirmative defense in this case, docket
10 No. 415.

11 Let me ask, there's -- you know, counsel for the
12 Government, Mr. Drake, I didn't see a response to that motion
13 filed by the Government. What is your, you know, your
14 position on that motion?

15 **MR. DRAKE:** Sure. Thank you, Judge.

16 I anticipated -- we didn't file a response because I
17 anticipated we would be discussing that matter here today or
18 at some status conference hearing.

19 The Government's position is as follows, Judge: The
20 Government does not believe a factually based evidentiary
21 hearing is necessary. We believe that the matter is fully
22 briefed before the Court. And consistent with other
23 decisions, such as the *Ahmed* case in the Eighth Circuit out of
24 Minneapolis, Minnesota, we believe the Court is fully capable
25 of deciding the issue based on the briefings of the parties.

1 I understand or I believe -- and defense counsel can
2 speak for themselves obviously -- that the defense does not
3 agree with the Government on that subject.

4 At the absolute most, the Government believes that
5 there may be a need for a motions hearing or a hearing on the
6 status of the law. As is evident from the briefings that the
7 parties have filed, the defense and the Government disagree
8 about which law is applicable in this case. I don't think
9 that we can really move forward on any factually based hearing
10 when the status of the law is unsettled.

11 By way of example, Judge, the Government believes
12 that, as is evident from the briefing, the Geneva Conventions
13 apply and that that is the controlling law. That is the law
14 that's applied by every district court that the Government is
15 aware of whenever this defense has been raised.

16 The defendants believe -- and I'm not going to speak
17 for their characterization of the law, but in a different set
18 of laws, that the laws of belligerency and Civil War-era
19 conflict and the Neutrality Act. If that is the law that the
20 Court adopts, then we would need to know what that law is in
21 order to know what the elements of the affirmative defense are
22 to know what type of evidence might need to be proffered.

23 For instance, since it's the defendants' burden on
24 this affirmative defense, we would need to know what choice of
25 law the Court would make. The Government is of the opinion

1 that if the Court were to look at the briefs and make a
2 decision about which law applies, that should the Court agree
3 with the Government, there would be no need for an evidentiary
4 hearing, because as a matter of course, the parties are in
5 agreement that the characterization of the conflict in Syria
6 is a non-international armed conflict, we need to go no
7 further. That would be consistent with the *Ahmed* decision in
8 Minneapolis, consistent with this circuit and consistent with
9 every other court that's examined it.

10 However, if the defendants' characterization of the
11 law applies, then we might see a different result in terms of
12 what evidence would need to be presented.

13 So the long answer to your question, Judge, is we
14 believe that at most a status conference hearing on the status
15 of the law would be necessary. And once that decision has
16 been made, we may or may not need a factually based
17 evidentiary hearing.

18 **THE COURT:** All right. I did go back and listen to
19 the presentation that was made back on May 30, 2017, when this
20 matter was first brought to the Court's attention. And the
21 point I think that you are making, as far as whether or not
22 evidence would be appropriate, really wasn't discussed. I
23 thought perhaps it was. But I didn't -- because I had in mind
24 that this was an issue.

25 All right. Thank you very much.

1 Mr. Swift, do you have a reply, I suppose.

2 **MR. SWIFT:** I do. I do, a bit of one.

3 We believe -- I agree with one thing on the
4 Government. There are significant legal questions that
5 precede this. To put them in context, however, factual
6 questions have to be determined by the Court. The Court may
7 be able to take notice of it, but there are factual questions
8 that underlie it.

9 The question presented to the Court is one that is
10 rather unique and no precedent thorough -- completely over
11 laws in what I would call the post-911 cases. In the post-911
12 cases, they dealt with conflicts where the U.S. was a party.
13 And that's important because they raise, primarily within the
14 Geneva Conventions, international conflicts because if the
15 U.S. is a party in a foreign conflict, it's an international
16 one.

17 Our position is not that Geneva is irrelevant, but
18 that Geneva does not cover this particular part from where a
19 U.S. Court is concerned. This is a civil war being conducted
20 in a country wherein we were not actively involved in the
21 combat, at least during the time in question. There are
22 periods of time in this conflict where things change, but
23 during this period of time we believe that the evidence would
24 show that this was a period of time where the United States
25 was not actively involved in conflict.

1 Under that, as we've set out in our briefing, sets
2 the Court to a different set of analysis to determine whether
3 under U.S. law combatant immunity would nevertheless exist.
4 The United States -- and we have set out, again, for the
5 status hearing, and I don't mean to argue our motion yet at
6 this time, sets out a period of -- sets out the criteria
7 wherein we would recognize the existence of a war and the
8 potential for combatant immunity.

9 It's the defenses' position that not all civil wars
10 would have combatant immunity. Not all combatants in a civil
11 war would have combatant immunity. You would, nevertheless,
12 under the laws of belligerency, of which the Geneva
13 Conventions are only one, if you go back to the Hague and all
14 the standing international law that might apply and the law
15 that has been applied in the United States, because this is
16 quintessentially a U.S. crime. It is not -- we are not -- the
17 Government has not charged a war crime, per se, under the war
18 crime statute. They are instead, which is a great breach of
19 the Genevas, these are U.S. crimes. And whether that would
20 apply in this context under U.S. law is a determination for
21 the Court, but it does need factual information to apply that.

22 To give an example, back from the Civil War, not all
23 belligerents on the southern side enjoined combatant immunity.
24 Raiders and others who were not engaged in the normal
25 conflict, you know, what one would think of as a conventional

1 war between the two sides, did not enjoy it. This state was a
2 (indiscernible) to because it's most famously from Missouri.
3 And many of the Missouri combatants were not afforded
4 combatant immunity during that period of time because of the
5 manner in which they (indiscernible) the combatancy.

6 And so that's a -- we said to you a factual question
7 that you will need to understand on the part of, okay, what is
8 the type of combatancy going on here because inside a civil
9 war, where a combatant immunity is presumptuously in place, in
10 an international armed conflict between the two forces of the
11 sides, it flips -- it's the defenses' position that it does
12 flip. It places a greater burden in a civil war to show that
13 it meets the general characteristic under the state -- the
14 tests that were put out by the United States Supreme Court and
15 have never been reversed.

16 So there is a factual predicate. And we believe
17 that a factual hearing is necessary for that part on it. In
18 part. So we believe that they can be combined; that it is
19 not -- it's in the interest of judicial economy to combine and
20 have the factual hearing to the extent necessary on that part;
21 and then also the legal arguments on how those facts apply
22 inside the conflict.

23 We do find that there is one area in our brief which
24 came late in the briefing but I think is extremely important
25 to the Court, and that's the neutrality doctrine, which might

1 preclude, although I think it still requires factual findings
2 by the Court, that there was, in fact, a civil war recognized
3 by the United States at the time of the combatancy and that
4 the conspiracy here involved at least one of the combatants in
5 it, was involved in that civil war as recognized by the United
6 States. Because the neutrality doctrine, you know, as set out
7 by Justice Marshall, and I have found no case reversing it,
8 sets out that part.

9 So there might be a part --

10 **THE COURT:** Let me ask you.

11 **MR. SWIFT:** -- where there's no hearing required at
12 all on the facts.

13 **THE COURT:** Just one second. Let me ask you: Do
14 you agree with Mr. Drake that if I were to make a choice of
15 law determination that there is a possibility that no
16 evidentiary presentation would be necessary, depending on the
17 choice of law, I just --

18 **MR. SWIFT:** I think --

19 **THE COURT:** I just want to just get your
20 understanding.

21 **MR. SWIFT:** There is a potential that, yes, you
22 could do that in a part; you could make a finding that the
23 United States simply no longer recognizes combatant immunity
24 in a civil war.

25 **THE COURT:** Okay. Okay.

1 **MR. SWIFT:** Despite the precedent to the contrary.

2 **THE COURT:** Okay. The other --

3 **MR. SWIFT:** Or you could --

4 **THE COURT:** -- question I have now.

5 **MR. SWIFT:** Yes.

6 **THE COURT:** I want you to tell me, is it possible
7 that an evidentiary presentation can be made by proffer? Are
8 there disputes among the parties about the facts that may have
9 occurred in -- in the battlefields of Eastern Europe and
10 Europe.

11 **MR. SWIFT:** To that I don't know the answer. And
12 the reason I don't know the answer is that really the only
13 party that's proffered facts are the defense.

14 **THE COURT:** Okay. Well --

15 **MR. SWIFT:** The Government in its motions has not
16 proffered, to my view, an alternative set of facts.

17 **THE COURT:** Okay. I will require counsel to confer
18 as to whether or not there is a factual dispute on facts that
19 the parties would place in evidence at any hearing.

20 That being said, there was a reference at one time
21 in these proceedings about an expert witness.

22 **MR. SWIFT:** Yes.

23 **THE COURT:** Okay. And how many experts I suppose?
24 Just one?

25 **MR. SWIFT:** We have one.

1 **THE COURT:** And how long would that person testify?

2 **MR. SWIFT:** I would anticipate that his direct
3 testimony would be between one and a half and two hours.

4 **THE COURT:** Okay.

5 **MR. SWIFT:** Based on the length of his report. It
6 was proffered with this part, but he has done substantial
7 investigation into -- similar to the type of investigation
8 he's done for the CIA and others in an academic world --

9 **THE COURT:** Okay.

10 **MR. SWIFT:** -- on these types of conflicts.

11 **THE COURT:** Okay. Well, let's assume that the
12 parties cannot agree on the accuracy of any proffer of factual
13 material which, I just want to be clear, I do not expect from
14 counsel. I would expect that there would be substantial
15 agreement about what historical facts were. And that even
16 opposing positions on evidentiary facts can be made by a
17 proffer. That is my strong thinking on the matter.

18 So, you know, the parties have had nearly a year now
19 to be preparing for this presentation. And one issue had
20 to -- that we talked about at one time was discovery of
21 information, perhaps witnesses outside the United States.

22 **MR. SWIFT:** We have located those witnesses. Now --

23 **THE COURT:** Okay. Have you deposed them?

24 **MR. SWIFT:** No. The expert interviewed these
25 witnesses, Your Honor. I have not yet sought a deposition.

1 And regardless of how this hearing goes out, we will be
2 seeking depositions of those witnesses because the Government
3 has conceded -- at least where Mr. Harcevic is concerned, as I
4 understand it from them, that if Mr. Harcevic's support went
5 purely to humanitarian aid, in other words buying of food,
6 vegetables, that sort of thing, that would not constitute
7 murder or the support of murder, and that it had to go to
8 combatancy.

9 And both of these witnesses, along with testifying
10 with how they thought and where they thought Mr. Pazara was
11 located, also testified to humanitarian efforts that he made
12 on the biopic pictures. So regardless of whether a combatant
13 immunity defense were accepted, there's the alternative, at
14 least as far as my client goes, I don't want to speak for
15 anyone else, that these witnesses would also be relevant to
16 whether --

17 **THE COURT:** Okay. Let me ask you.

18 **MR. SWIFT:** Yes. So I'm going to seek a deposition
19 for them, but I was waiting for this part before it.

20 **THE COURT:** I'm confident I have -- I would go back
21 and listen to all of the status conferences that I probably
22 stated that I would have approved any deposition proceeding at
23 any time to -- and I even -- I have a recollection of
24 mentioning even making a witness available by Skype into the
25 courtroom.

1 **MR. SWIFT:** Right.

2 **THE COURT:** Well, how much time -- let's assume -- I
3 mean, I would grant the defendants leave to pursue the
4 deposition process, but I'm a little surprised that hasn't
5 been done before now. But that being said, how much more time
6 would be necessary to achieve that discovery in that fashion?

7 **MR. SWIFT:** And the depositions, I would presume
8 that they would be -- I -- the depositions themselves would
9 take a day. Making the logistics in Bosnia, I'm not prepared
10 to answer immediately, Your Honor. We've had two different
11 interviews with them. We've sent an investigator and then the
12 expert. So we have located them. I don't know that it would
13 be difficult or not. It's more getting through the procedural
14 hurdles.

15 Both have indicated that they are willing to sit for
16 a deposition; they are willing to talk; they are willing to do
17 all of those things and we have the information for it. So I
18 would have to leave the -- you know, this is -- the other
19 hurdle of depositions are, of course, going through the
20 government of Bosnia. That's the next part, letters rogatory
21 to have the depositions potentially on that part. And I would
22 want to go through the government in this case.

23 So letters rogatory might take some period of time,
24 but --

25 **THE COURT:** Could --

1 **MR. SWIFT:** Yes.

2 **THE COURT:** Do we have to be -- go through that
3 formality if -- if someone would appear via a digital
4 communication system and the person was verifiably identified?

5 **MR. SWIFT:** You know, Your Honor, I am always
6 hesitant because I don't know the politic -- I haven't asked
7 the politics on the land. I would agree with you legally, as
8 far as this Court's concerned, it is not required. I am
9 always a little hesitant -- or always, not a little hesitant
10 to go into a foreign country and proceed with a legal event
11 where that had not been cleared with the local authorities to
12 permit that.

13 My understanding from both the witnesses is that
14 they would voluntarily appear for those, but I don't want to
15 speak and guarantee you that that could happen when neither
16 the Government nor I have spoken to the Bosnian government
17 about it.

18 And I give just one example of where I think counsel
19 can make a big mistake. I'm involved in the habeas part on
20 it, which was the *Khan* case in Florida where they set up
21 exactly that arrangement -- digital links in Pakistan during
22 the course of the trial or a hearing that after the first
23 witness was shut down by the government of Pakistan because
24 they had not agreed. And I don't want to place myself in that
25 same position, because we are speaking about a second-party

1 government and I am under no illusions that these persons will
2 get visas from the United States to come to the United States.
3 That's not going to happen.

4 Nevertheless, I do think that they are important.
5 Now, they have --

6 **THE COURT:** Would they be willing to travel to the
7 United States?

8 **MR. SWIFT:** They would be willing to travel to the
9 United States, but they are not going to gain -- because of
10 their -- because they were participants in the Syrian
11 conflict, I think that it would be illusory to say that they
12 would be permitted to travel to the United States from Bosnia
13 under the current travel restrictions. And I have never had a
14 witness who was a participant gain such access.

15 **THE COURT:** Okay.

16 **MR. SWIFT:** So, you know, in the course of this, my
17 feeling is that we could certainly potentially -- I've done
18 these electronically for the Court. I've done them with the
19 United States at the U.S. embassy or at a hotel where we just
20 videotaped the deposition and had the Court available for
21 objections and just maintained the objections, did that
22 version in Sadiki (phonetic) in Afghanistan.

23 Now, in Afghanistan I wasn't -- neither party were
24 worried about the government because we had a very close
25 alliance. And then I have done them, you know, via letter

1 rogatory in another case wherein we -- in Pakistan -- again,
2 having learned from the *Khan* case to make sure that the
3 government of Pakistan was okay.

4 **THE COURT:** Okay. Thank you very much.

5 Mr. Drake, do you have a response to what Mr. Swift
6 has said?

7 **MR. DRAKE:** Yes, briefly. And more for some of the
8 questions that the Court had.

9 I think the Government is confident -- the Court
10 asked about a proffer of facts. I think the Government is
11 confident that the parties, defense and the Government, could
12 come to some understanding and make some stipulations of fact
13 for the Court in general terms. In other words, I don't -- we
14 don't have a substantial disagreement among all of the
15 parties, the Government included, about the facts of what's
16 going on here. And I think we could make some submission to
17 the Court, some proffer of facts to aid the Court in its
18 decision about the choice of law and things like that.

19 The Government's position is quite simply that this
20 is an affirmative defense. Every other court that's ever
21 heard this type of affirmative defense has decided on one set
22 of laws, the set that the Government is arguing. And most
23 courts have been able to resolve that issue without a
24 factually based evidentiary hearing once you have some facts
25 before the Court to make -- to form the basis for your

1 decision.

2 For instance, if -- I think we are all in
3 agreement --

4 **THE COURT:** I do understand what you are saying.

5 **MR. DRAKE:** Secondly, as far as the witnesses are
6 concerned that Mr. Swift is talking about, we also don't have
7 a problem with that. I don't know that that should hold up
8 moving forward on the combatant immunity issue. I think what
9 Mr. Swift's witnesses would be speaking to are trial defenses,
10 trial issues. In other words, those witnesses are not going
11 to speak to the type of conflict that was going on in Syria or
12 whether or not this was an armed international conflict or a
13 non-international conflict.

14 So I don't think that -- and Mr. Swift can correct
15 me if I'm wrong, obviously he will, but I don't think that
16 they will substantially change the playing field for issues
17 that the Court would need to decide for this affirmative
18 defense.

19 **THE COURT:** Okay. Let me ask that -- I'm losing my
20 train of thought a little bit.

21 How much time would the parties need -- and my
22 interest is in advancing this matter. Well, there is a legal
23 issue that I would like the parties to at least have in mind.
24 If the defendants proffer a substantial basis, whether a *prima*
25 *facie* showing of evidence of the establishment of the

1 affirmative defense, does that or does that not put the burden
2 on the Government as with respect to some other affirmative
3 defenses to disprove that affirmative defense beyond a
4 reasonable doubt?

5 **MR. DRAKE:** I think -- yes, if I understand your
6 question correctly, Judge. If the defense makes a *prima facie*
7 showing that --

8 **THE COURT:** And we are speaking about in terms of
9 what a trial jury would be instructed on. I'm not -- but
10 I'm -- just for the context.

11 Now, that harkens back to the discussion, perhaps,
12 in May, on May 30, 2017, when the parties, I think, agreed
13 that the outcome of the presentations on the affirmative
14 defense procedure would advance the disposition of the case.
15 And, in fact, I voir dired under oath each of the defendants
16 at that time and they all agreed to this procedure as sort of
17 a shortcut to getting to a position of disposition.

18 And so, you know, there's a lot of value to be
19 accomplished by this. And one thing I don't want to do, and I
20 think the parties even at the Rule 104 hearing and, you know,
21 if I were to make a determination as to what evidence is not
22 relevant, whether or not -- if I were to make a choice of law
23 that would eliminate at least at that stage the relevance of
24 some evidence, the parties would be entitled to make a showing
25 of proof, a proffer, of what that evidence would be so that a

1 reviewing court or judge could make a determination as to
2 whether or not the procedure at this level was appropriate.

3 So I'm -- even if I were to ultimately make a
4 determination as to what the choice of law was, I want to be
5 fully informed about what the evidence would be on both sides.
6 That said, I think that the parties can proceed. Unless there
7 is a substantial disagreement as either to the availability of
8 evidence of a certain relevant fact or the credibility of a
9 source of information, that the parties could agree on proffer
10 of information to the Court. And I thought that -- I was
11 looking for that in the statements on that date. I didn't
12 find it on that date but that's what the Court had in mind
13 hopefully; that the parties could proffer statements of fact
14 with a showing of what the source of that information would be
15 and the Court could receive that.

16 And I would be -- if there was a need then or a
17 desire to put on the record more easily such as having an
18 expert testify live, along with the presentation of proffers
19 of information, that the parties -- or stipulations, actually,
20 of fact, of relevant fact, that the Court could then proceed
21 to make the determinations at this stage.

22 I know that's a lot, but I --

23 **MR. DRAKE:** I think that we can do that, Judge,
24 either individually by simply proffering to the Court what the
25 United States' evidence would be if we were to proceed to a

1 hearing or certainly I think some sort of joint discussion
2 with the defense about -- we believe those facts could be
3 determinative, if we could agree to them, based on the Court's
4 decision on the law.

5 **THE COURT:** Okay. There is, you know, the
6 outstanding motion, I think, before Judge Perry on the *Frye*
7 business about -- but that's -- we are backed off of that now,
8 I believe.

9 **MR. DRAKE:** Yes, Judge. And in answer to your
10 earlier question or one of your earlier points, the Government
11 and the defense all met, and the Government agreed to postpone
12 seeking a superseding indictment until the conclusion of these
13 proceedings simply because there was some hope that they might
14 be determinative. Whether or not they will, I don't know.
15 But, you're right, we did believe and do still believe that
16 this could maybe resolve matters. But we are not certain
17 about that.

18 **THE COURT:** Okay. All right. Mr. Swift.

19 **MR. SWIFT:** Yes, Your Honor.

20 **THE COURT:** What we have before us is the defense
21 motion --

22 **MR. SWIFT:** Yes.

23 **THE COURT:** -- for the hearing, the joint motion.

24 **MR. SWIFT:** Yeah.

25 **THE COURT:** How long do you think it would take you

1 to, on behalf of all of the defendants, to provide the Court
2 with an itemized list of the relevant facts on the -- of the
3 affirmative defense.

4 **MR. SWIFT:** Yes, Your Honor.

5 **THE COURT:** From the defendant's perspective with an
6 identification of the expected source of evidence to sustain
7 those statements of fact.

8 **MR. SWIFT:** I could have that in two weeks from
9 today.

10 **THE COURT:** Two weeks. Okay.

11 **MR. SWIFT:** I trust my counsel will be able to all
12 agree with what I have on that. I'm speaking on the part, but
13 I know I can produce it and get it reviewed by that period of
14 time.

15 **THE COURT:** Okay. And just for the record, you
16 know, I want the record to be entirely clear, Mr. Curran and
17 Mr. Dwyer are present in the courtroom taking diligent notes.
18 I just want the record -- along with Ms. Dragan from the
19 Public Defender's Office.

20 All right.

21 **MR. SWIFT:** And I do see, Your Honor, I would point
22 to the part -- part of the reason I'm in this case is it's
23 extraordinarily academically interesting.

24 **THE COURT:** I entirely --

25 **MR. SWIFT:** It is an academically fascinating case.

1 **THE COURT:** Justice Vaughan, back in 1670, in
2 Bushel's case said that in order to find out what the law is,
3 you need to know what the facts are. In order to find out
4 what the facts are, you really need to know what the law is.
5 So they sort of go hand in hand.

6 **MR. SWIFT:** Yes. And because it presents novel
7 issues, and because they are a part, I think that the Court
8 has to have -- we do need to come down to a set of either
9 agreed facts or facts to support what it found. Because I
10 anticipate that the loser appeals. I would expect the
11 Government, if they were to lose, to appeal in part down the
12 road. It may resolve things. I don't know. But because of
13 the novelty of the issue, I agree --

14 **THE COURT:** I understand.

15 **MR. SWIFT:** -- with the Court that we need to have
16 the facts --

17 **THE COURT:** I understand.

18 **MR. SWIFT:** -- in the part of this.

19 **THE COURT:** I understand. But whether or not
20 there's any appeal, whether or not the parties then engage in
21 meaningful discussions is entirely for the parties to work
22 out.

23 **MR. SWIFT:** Yes.

24 **THE COURT:** All right. Two weeks.

25 **MR. DRAKE:** Judge, can I interrupt just for one

1 second.

2 **THE COURT:** Yes.

3 **MR. DRAKE:** Just so I'm clear.

4 The Government could also do the same thing, which
5 is proffer from the facts that it believes within the same --
6 I'm sorry -- within the same time period. Alternatively,
7 should the defense proffer its facts within two weeks, the
8 Government could respond and either agree with those facts or
9 not.

10 What I'm trying to figure out is: Would you like us
11 to confer about what those facts would be in advance? Do you
12 want us to respond? Or do you want us to proffer our own
13 separate set of facts to the Court? How would the Court best
14 like us to proceed?

15 **THE COURT:** Well, and I don't want to delay things.
16 And maybe the two of you can confer so that simultaneous
17 presentations can be helpful and maybe even a joint
18 presentation.

19 **MR. SWIFT:** Well, if we are going to go to that,
20 what I would propose to that is this: That two weeks from now
21 I will get that to the Government; that the Government be
22 given a week to indicate what they agree or disagree with and
23 any alternative facts that they would like to put into it; and
24 that we have two days after that, which would put it to the
25 end of this month, I'm thinking, if I've counted things up

1 right, for a joint submission at that point.

2 **THE COURT:** Okay.

3 **MR. SWIFT:** That gives us a little time to go back
4 and forth because I have a lot of cats.

5 **THE COURT:** I'm not looking for a disposition -- for
6 presentations that would dispose of the matter. I'm looking
7 for a set of deadlines or at least to be informed about what
8 the scheduling for this hearing would require. I am not -- if
9 the parties are not going to disagree about a lot of the
10 historical facts, then there's not going to be a need to file
11 letters rogatory to get permission for proceedings in foreign
12 countries.

13 **MR. SWIFT:** I understand.

14 **THE COURT:** And, you know, I just don't see a need
15 for that unless there is some actual substantial disagreement
16 with what the facts, the relevant facts, historical facts are.

17 And I think then that the -- as I said, I think --
18 if I were to agree with the Government on what evidence is
19 relevant, then the defense would be in a position of being
20 entitled to make a proffer of -- a record of what the facts
21 would be had you been given an opportunity and vice versa.

22 So, you know, we are not going to shorten the record
23 too much by making an early determination of choice of law is,
24 I guess, one point I want to make. But if on the same
25 elements that Mr. Swift has in mind, you would have other

1 items of evidence, then I think that that would be
2 appropriate. But I think the defense can go first. I'll give
3 you two weeks. And then I think that would -- I hate to get
4 too far. Defendants by March or by February 20, two weeks
5 from today. And then the Government, by March 6. That's two
6 weeks.

7 **MR. DRAKE:** That's fine, Judge. And I'll sit with
8 defense counsel, certainly, if they want me to, and confer and
9 we can hopefully even get it quicker.

10 **THE COURT:** Okay. Mr. D'Agrosa, has he withdrawn?
11 He is really withdrawn?

12 **MS. FRETER:** He has left the building, Judge. It's
13 my understanding that Mr. D'Agrosa has been given an ethics
14 opinion from the U.S. Attorney's Office that he's not to work
15 additionally on these cases in any manner. So that is going
16 to hinder -- he can give me the file and he can give me the
17 very brief thumbnail, which he has done, which is mostly
18 contained in the indictment, but he is not allowed to, it's my
19 understanding, assist me in terms of when other defense
20 counsel has come up with these facts, he is not going to be
21 allowed to sit down with me and say this is right or you need
22 to add this or this is incorrect.

23 **THE COURT:** Right.

24 **MS. FRETER:** The other federal public defenders
25 certainly will help me. I'm sure co-defendants' counsel will

1 help me. But sitting here today without a file, Judge, I
2 can't promise this Court that with a two-week turnaround I'll
3 be totally up to speed by that point.

4 **THE COURT:** I understand.

5 I have a draft order. He's -- he would give you his
6 file, in effect, and provide you with information that he has
7 been provided with, documentary and otherwise, right away.
8 And so what you are saying is not that he has not done that or
9 doesn't intend to do that.

10 **MS. FRETER:** No. It's my understanding -- we spoke.
11 It's my understanding he is intending to give me the file, but
12 he is not going to be allowed to, because of this short
13 turnaround time, he's not going to be allowed to -- sometimes
14 when you take a file over from counsel, with this sort of
15 thing moving quickly, he would be allowed to sit down with me,
16 review the document and say, you know, here at point 3, this
17 is not agreeable, that he is not going to be able to engage in
18 that sort of back and forth.

19 I will have co-defendants' counsel to consult with.
20 I just wanted to, for the record, to indicate to the Court
21 that I will try my very, very best, but that I'm at somewhat
22 of a disadvantage today only having read the pleadings that
23 are available but not the entirety of the file.

24 **THE COURT:** I understand. And I appreciate your
25 making a record on that and I expect that within the rules of

1 professional responsibility, counsel for the Government would
2 cooperate in explaining things, you know, to help you come up
3 to speed and cocounsel for all of the defendants would do the
4 same.

5 **MS. FRETER:** My concern is if you are talking about
6 a stipulated fact as to the date that whatever hostilities
7 first started is one thing. My particular concern is as it
8 involves my client particularly in terms of a stipulated fact;
9 that there may be a certain fact that is more essential to her
10 or more disagreeable to just her particular case rather than
11 the sort of overarching thing. I will have to see what gets
12 drafted first, but then if after speaking with my client we
13 are in a position where we may need to change things, I'm just
14 letting the Court know that I may file a motion to that
15 effect.

16 **THE COURT:** Oh, I understand. And I appreciate
17 that. You will have what the -- you know, the other attorneys
18 for the defendants will file in two weeks, you will have that,
19 be able to confer with your client about that in the two weeks
20 that the Government is going to take. And you can -- I would
21 expect that if there is an issue about preparation, about
22 knowledge, that you would bring it to the Court's attention.

23 **MS. FRETER:** Thank you, Your Honor.

24 **THE COURT:** All right. Thank you very much.

25 All right. Mr. Drake.

1 **MR. DRAKE:** Yes, sir.

2 **THE COURT:** On behalf of the Government, is there --
3 I think we've gone over the issues that I wanted to bring and
4 discuss with counsel. Do you have any report to make on any
5 other discovery disclosure?

6 **MR. DRAKE:** No, not substantially, Judge. I've
7 spoken with the Public Defender's Office very briefly. The
8 Government continues to work on verbatim translations. I have
9 a number of those with me that I have not disseminated. I
10 will continue to do that. But in terms of the substantive
11 discovery, everything that the Government is aware of at this
12 time has been disclosed. Now we are just working on the
13 (indiscernible) to English translations.

14 And just so the Court knows, and for the record, I
15 will extend the same offer to Ms. Freter as I did to every
16 other counsel, which was to sit down and go through the
17 discovery, go through what the Government has turned over. It
18 is voluminous and we are in the process of trying to make a
19 potential index for defense counsel to that effect. But I
20 will do the same thing to expedite matters there.

21 **THE COURT:** All right. I'm sure Ms. Freter would
22 take advantage of that.

23 **MS. FRETER:** Thank you, Your Honor.

24 **THE COURT:** Mr. Swift, is there any other item that
25 you would like to have taken up at this time?

1 **MR. SWIFT:** No, Your Honor. Just one note for the
2 Court's knowledge. I will be in the United States versus
3 Salman which is the Orlando shooting trial in Orlando from the
4 1st of March -- it's a five-week trial -- until the end of
5 April. I can easily make my filings. I have staff. I'm able
6 to do that. But I wanted to let the Court know that if we
7 were to try and do something in the month of March, I'm gone.
8 But I'm back in April, Your Honor.

9 **THE COURT:** All right. No hearing during March.

10 **MR. SWIFT:** Thank you, Your Honor.

11 **THE COURT:** All right. Ms. Dragan, do you have
12 anything to put on the record or to add to the comments today?

13 **MS. DRAGAN:** No, Your Honor.

14 **THE COURT:** Ms. Trog?

15 **MS. DRAGAN:** Your Honor, can I say just one ...

16 Mr. Drake and I did speak about having an index put
17 together and part of the problem that we are having with our
18 client in the county is we have all these disks that we
19 provided and he is supposed to be getting access to them.
20 There's, I don't know, let's just say at least 50.

21 The jail is randomly choosing five to give to him
22 and they are choosing, not him, and he is only getting an hour
23 or two at a time. So we are trying to put together an index
24 with the help of the Government, put everything on a hard
25 drive, so our client actually has access to the discovery.

1 So we just wanted the Court to be aware that we are
2 still having actual discovery issues with our client having
3 access to things and that does -- that is slowing things down
4 for us.

5 **THE COURT:** Okay.

6 **MR. CURRAN:** I realize it's not irrelevant. We have
7 told him that we would make the record with you because you
8 may see a motion if we can't get something done through the
9 normal channels.

10 **THE COURT:** All right. Okay. You can tell the jail
11 administration that the Court expects cooperation so that this
12 can be accomplished.

13 **MS. DRAGAN:** Thank you.

14 **THE COURT:** Thank you very much. Ms. Trog.

15 **MS. TROG:** Your Honor, I can appreciate everything
16 we've talked about. I can appreciate Ms. Freter's position
17 just coming into a case. But we are approaching the third
18 anniversary that three of these defendants have been confined.
19 And however quickly -- and I appreciate Mr. Swift giving you
20 his schedule so that we can get something figured out sooner
21 than later.

22 I know people will probably throw bags at me, but I
23 am concerned about speedy trial provisions. And that's my
24 concern, Your Honor, is that if we could do this to allow each
25 side to present what it must present but -- and I know the

1 Court has this in mind as well, but three years and we have
2 nothing accomplished.

3 **THE COURT:** Well, no, I don't think that last
4 statement is a fair statement.

5 **MS. TROG:** Well, we had discovery -- well, no, no,
6 no. Well, for the defendants, Your Honor, for the defendants.

7 **THE COURT:** Well, we have had motions to dismiss
8 that were litigated. I filed an R&R on the motions to
9 dismiss. And we have talked a lot about things, so ...

10 **MS. TROG:** Well, perhaps I misstated. To our
11 defendants or to certainly to my defendant, Mr. Rosic. And
12 he's read your rulings, Your Honor, and he's read all the
13 filings. But he is getting a little antsy as to his day in
14 court.

15 **THE COURT:** I understand. All right.

16 **MS. TROG:** Thank you.

17 **THE COURT:** You are welcome. All right. Mr. Goeke.

18 **MR. GOEKE:** I have nothing further, Your Honor.

19 Thank you.

20 **THE COURT:** All right. Thank you all very much. I
21 will issue orders on counsel for Ms. Hodzic. And I'll issue a
22 scheduling order on what the Court expects in two weeks and
23 then in four weeks.

24 All right. Thank you all very much.

25 (The proceedings concluded at 11:06 a.m.)

CERTIFICATE

I, Reagan A. Fiorino, do hereby certify that I am a duly appointed official court reporter for the United States District Court for the Eastern District of Missouri.

I further certify the foregoing is a true and accurate transcription as heard and understood from the taped proceedings held in the above-entitled case as has been transcribed from said tape to the best of my ability.

This reporter does not certify any transcript nor takes any responsibility for missing or damaged pages of this transcript when said transcript is copied and delivered by any party other than this reporter.

August 26, 2019

/s/Reagan A. Fiorino

Date

Reagan A. Fiorino